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Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-80

GEORGE F. KUGLER, JR., Attorney General of the State of New Jersey, JOSEPH A. HAYDEN, JR., Deputy Attorney General of the State of New Jersey, CHIEF JUSTICE JOSEPH A. WEINTRAUB, ASSOCIATE JUSTICES NATHAN L. JACOBS, HAYDN PROCTOR, FREDERICK W. HALL, WORRALL F. MOUNTAIN, JR., and MARK A. SULLIVAN, of the Supreme Court of New Jersey, and THE STATE OF NEW JERSEY,

Petitioners,

vs.

EDWIN H. HELFANT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR RESPONDENT, EDWIN H. HELFANT

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TABLE OF CONTENTS

Argument 2

Conclusion 12

CASES CITED:

Abrams, In re,
65 N.J. 172 (1974) 9

Adickes v. S. H. Kress & Co.,
398 U.S. 144 (1970) 4

Baxter v. Birkins,
314 F. Supp. 222 (D. Colo. 1970) 8

Bennett v. Gravelle,
320 F. Supp. 203 (D. Md. 1971) 8

Blasi, In re,
64 N.J. 71 (1973) 9

Chapman & Dewey Lumber Co. v.
Bd. of Directors of St. Francis Levee Dist.,
234 U.S. 667 (1914) 3

Chessman v. Teets,
350 U.S. 3 (1955) 10

Colsey, In re,
63 N.J. 210 (1973) 9

Hackett v. McGuire Bros.,
445 F.2d 322 (3d Cir. 1971) 3

Helfant v. Kugler,
500 F.2d 1188, 1198, n.7 (3d Cir. 1974) 6

Johnson v. United States,
225 U.S. 405 (1912) 4

TABLE OF CONTENTS

CASES CITED:

Lanza, In re,
65 N.J. 347 (1974) 9

Leavitt v. Howard,
462 F.2d 992 (1st Cir.), cert. denied,
409 U.S. 884 (1972) 10

Napue v. Illinois,
360 U.S. 264 (1950) 11

New York & Central Min. Syndicate & Co.
v. Fraser,
130 U.S. 611 (1889) 2

Redfield v. Parks,
130 U.S. 623 (1889) 3

Thomas v. Craven,
473 F.2d 1235 (9th Cir. 1973) 10

Union Pacific R. Co. v. Mason City
& Ft. Dodge R. Co.,
199 U.S. 160 (1905) 2

United States v. Banks,
374 F. Supp. 321 (D. S.D. 1974) 11

United States ex rel. Thomas v. State of New Jersey,
472 F.2d 735 (3d Cir. 1973) 10

United States v. Heath,
260 F.2d 623 (9th Cir. 1958) 11

United States v. McCord,
43 U.S.L.W. 2257 (D.C. Cir., Dec. 12, 1974) .. 11

United States v. Poole,
379 F.2d 645 (7th Cir. 1967) 11

TABLE OF CONTENTS

CASES CITED:

United States v. Taylor,
147 U.S. 695 (1893) 4

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 9

FEDERAL RULE CITED:

F.R.C.P. 12(b) (6) 3

STATUTE CITED:

N.J.S.A. 2A:81-17.2a2 6

U.S. CONSTITUTION CITED:

Fifth Amendment 6, 7, 8

U.S. CODES CITED:

42 U.S.C. §1983 (1970) 8

28 U.S.C. §2254(d) (1970) 10

AUTHORITY CITED:

The American Bar Association Standards
on the Prosecution Function, section 5. 6(b) 11

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REPLY BRIEF FOR RESPONDENT, EDWIN H. HELFANT

Respondent, Edwin H. Helfant, submits this Reply Brief in response to the brief submitted by counsel for petitioners on December 30, 1974.

ARGUMENT

It is beyond refutation to say that the integrity of the appellate process rests upon the availability to the appellate court of a full and accurate record. *See, e.g., New York & Central Min. Syndicate & Co. v. Fraser,* 130 U.S. 611 (1889). It is the record made at the trial level that serves as the repository for those operative facts upon which the reviewing court depends to decide the particular case and, ultimately, fashion the rule of law. From the perspective of the appellate judge, a well-documented decision resting upon a full fact situation is strong, the rule of law emerging from the opinion vital and long-lived. Conversely, the opinion ill-grounded in fact, or based upon facts *dehors* the record most times is short-lived; it serves to build no rule of law of lasting vitality. *Cf., Union Pacific R. Co. v. Mason City & Ft. Dodge R. Co.,* 199 U.S. 160 (1905).

The ultimate responsibility for building the record is upon the attorneys involved with the cause at the trial level. Diligent counsel strive to build a complete record. Experience has shown that trial counsel have argued at great length to include a single question and answer, or a particular exhibit, for these have oftentimes proven to be the crucial facts necessary to sustain the verdict or obtain the reversal. *See, New York & Central Min. Syndicate & Co. v. Fraser, supra.* Trial counsel's responsibility in this regard extends not only toward his client, but, as importantly, toward appellate counsel who shall have to brief and argue the appeal, and most importantly, to the appellate tribunal that shall have to review the judgment. The responsibility then falls upon appellate counsel to present to the appellate court a factual statement most favorable, of course, to his particular client's position. It

must, however, be well-grounded in the record below and fully cited to the particular pages in the transcript or record from which the facts are taken. It cannot be conjectural or speculative; nor can it contain facts *dehors* the record. A party is bound to see that the record is properly presented. *Redfield v. Parks,* 130 U.S. 623 (1889). A factual statement failing in this regard is subversive of the entire appellate process. *Chapman & Dewey Lumber Co. v. Bd. of Directors of St. Francis Levee Dist.,* 234 U.S. 667 (1914).

It is with these basic precepts in mind that we come to the facts of this case. Respondent herein (petitioner in No. 74-277) has repeatedly emphasized the procedural nature of this case, that it comes before the Court after a dismissal of the complaint for failure to state a cause of action upon which relief could be granted. *F.R.C.P.* 12(b)(6). The allegations of the complaint *must* be considered as true, and *all* inferences reasonably flowing from the complaint, or from the testimony taken in the district court, *must* be resolved in favor of respondent. *Hackett v. McGuire Bros.,* 445 F.2d 322 (3d Cir. 1971).

What is the record below? Basically, it is the complaint (App. 60),* the testimony taken in the district court (App. 69) and an affidavit of Samuel Moore, a now deceased co-defendant (App. 171). As respondent has so many times pointed out, the testimony taken was his and that of Patrick T. McGahn, Jr., one of his attorneys. This testimony was wholly and completely corroborative of respondent's complaint.

It was upon this record, of course, that respondent fashioned his petition for certiorari and brief in No. 74-277 and upon which he relies for his argument herein. He has been scrupulous to document each operative fact

* App. refers to the Joint Appendix.

with a reference to the record; he has studiously avoided making even the slightest reference to something *dehors* the record. He understands that something that has not properly been included in the record cannot be made a part of it by inserting it therein. *United States v. Taylor*, 147 U.S. 695 (1893). This has been in keeping with what he and his counsel have conceived to be their responsibility to this Court and to the institution of our legal system itself.

Conversely, the petitioners, through the offices of the Attorney General of the State of New Jersey, have presented, in both their petition for certiorari and brief, a factual complex completely at variance with the actual record in this case. It is not too much to say that their statement of facts is grounded in surmise and conjecture. As will be amply documented below, it is a statement resting entirely upon material facts *dehors* the record. It is a statement based upon a belief by petitioners of what the facts should be, rather than what was presented to the district court. *Cf., Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Johnson v. United States*, 225 U.S. 405 (1912) (the record cannot be contradicted by what counsel may file in a cause).

The key to petitioners' factual complex is their statement that the facts in this case were not in dispute and were "essentially a matter of *official* record."[1] Never have petitioners explained what is meant by "official record," nor have they supported their statement with any citation to any official source. More importantly, petitioners neither produced testimony in the district court about any "official record," nor asked the district court to take judicial notice of it. They also failed to produce any exhibits,

1. Pb11, emphasis added.

or even an affidavit.[2] Petitioners thus call upon this Court to officially notice some amorphous "official record," the existence of which has never been documented, nor even alluded to until this case was brought before this Court.

Petitioners then ask this Court to rely upon their "official record" as the basis for some very crucial facts. They assert that Helfant's appearance before the grand jury was brought to the attention of the New Jersey Supreme Court (Pb13). They further assert that in accordance with "settled practice" the Administrative Director of the Courts was directed to obtain a report of Helfant's grand jury appearance from petitioner-Hayden "and all relevant grand jury testimony." *(Ibid)*. Petitioners then assert that the purpose of the meeting was to discuss with Helfant and Moore, his co-defendant, whether they should sit pending resolution of the grand jury investigation (Pb14). They further assert that the procedure utilized by the court was not unusual, since the court often solicited the judge's or attorney's view as to whether he would consent to a "self-imposed" suspension (Pb21). A careful examination of this argument shows that this is based completely on facts *dehors* the record, and furthermore, is fraught with inconsistencies.

First, respondent has repeatedly stressed that petitioners have never documented under what "settled practice" the New Jersey Supreme Court is allowed to examine raw grand jury testimony and evidence, or to interrogate an attorney in a procedure completely at variance with the applicable rules and statutes concerning the disciplining of attorneys. This represents a glaring deficiency in

2. Certainly it would not have been burdensome to the New Jersey court structure to produce the Administrative Director of the Courts, or Deputy Attorney General Hayden. In fact, Mr. Hayden did not appear in the district court for any purpose on May 9, 1973.

the petitioners' case, stemming, no doubt, from their decision to present no proofs to the district court.

Secondly, petitioners' self-serving statement (Pb21) that the purpose of the meeting with Helfant was to determine if he intended to sit as a municipal court judge pending resolution of the criminal charges, is completely *dehors* the record and represents the rankest kind of speculation and conjecture. Later, they change the focus, by saying that the purpose was to determine if Helfant should sit pending the grand jury investigation (Pb26). Never have the petitioners presented any testimony or even an affidavit with regard to the purpose of the meeting. In reality, petitioners' statements represent only the unverified averments of counsel, not sworn testimony of the parties.

The actual record belies petitioners' bald statements about the nature of the meeting and illuminates the inconsistencies of petitioners' statements. Petitioners assert that the purpose of the meeting was to determine if Helfant should sit as a municipal court judge pending the disposition of his case. The grand jury investigation was not directed at these activities, however. They were concerned with his activities as a private attorney. *See, Helfant v. Kugler,* 500 F.2d 1188, 1198, n.7 (3d Cir. 1974).[3] Furthermore, if the court was interested only in Helfant's judicial position why was the first question of the Chief Justice about Helfant's thoughts regarding the right of a judge to invoke the Fifth Amendment (App. 86)? Why did the Chief Justice insist on receiving an answer to this question (App. 86)? Why did Justice Sullivan then immediately follow this with a question about whether Helfant thought it right to invoke the Fifth Amendment when he himself sat in judgment of other people (App. 86)? Finally, why was the latest question of the Chief Justice, "What do you intend to do today (App. 87)?" Is there not, at least, a strong inference arising from this testimony that the court was concerned not with Helfant's position as a judge, but rather his intentions regarding the Fifth Amendment?

3. Thus, the petitioners agreed that *N.J.S.A.* 2A:81-17.2a2, the New Jersey public employee immunity statute, did not apply to Helfant's situation. This is in direct contravention to petitioners' statement that the Supreme Court was duty-bound to inquire into allegations of *judicial* misconduct (Pb28). In essence, they have refuted the position they assumed before the Court of Appeals.

Furthermore, if the court was actually concerned with Helfant's judicial position, why did it choose to have the meeting ten minutes before a scheduled grand jury appearance, when, because of the obvious time limitation, there could not be free and extended discourse? In addition, if the court was truly interested in Helfant's judicial position, why did it only consider the *incomplete* grand jury minutes, which consisted of the testimony of three incarcerated criminals? Did not simple fairness require the court to at least allow until the entire investigation had been completed before taking this action, if indeed its true motive was directed toward Helfant's judicial position? Certainly, if the court was concerned with Helfant's judicial position, then why was it not interested in the merits (Pb16; App. 86)?[4] Could such a procedure comport with notions of fundamental fairness and due process of law?

4. In fact, the court did go into the merits with Helfant, and inquired about the Bar Mitzvah of Helfant's son and other matters currently being investigated by the grand jury (App. 86-87). Moreover, the court saw Samuel Moore, Helfant's co-defendant, immediately after Helfant left the chambers, examined the criminal complaint which was the State's main exhibit against Helfant, and discussed with Moore the validity of Helfant's signature on the complaint (App. 173-174). At the conclusion of this meeting, Moore left the chambers (App. 174). *He had not been asked about the Fifth Amendment since he had not resorted to it.* (App. 171-74). He *never discussed with the Supreme Court about leaving his judicial position* (App. 171-74). *Nothing in the record reflects such a conversation. Lastly, he never agreed, according to the record, not to sit pending the conclusion of the investigation* (App. 171-74). The petitioners' statements to this effect are simply unsupported speculation. *See,* Pb16.

Could such a procedure protect the New Jersey judicial system from public ridicule?[5]

Lastly, if the Fifth Amendment was not the focus of the meeting, if this was not evident to Helfant from the nature and tone of the questions (App. 87),[6] then why did he testify before the grand jury when it had been his absolute expressed intention not to testify on November 8, 1972 (App. 170)? Surely, at least the inference of a coercive purpose flows from the testimony. And, be that as it may, there is no obligation to prove such a purpose in a case arising under the Civil Rights Act, 42 U.S.C. §1983 (1970); *Bennett v. Gravelle,* 320 F. Supp. 203 (D. Md. 1971); *Baxter v. Birkins,* 314 F. Supp. 222 (D. Colo. 1970).

These inconsistencies and contradictions show the petitioners' statement of facts to be what it really is: a fictional account of what petitioners would have this Court believe, a fabricated figment of their imagination. Thus, the bad faith implicit in Helfant's state prosecution continues. Rather than face an evidentiary hearing and air the facts once and for all, petitioners have consistently sought, through whatever means possible, to forestall such a truth-seeking inquiry. Twice they were ordered to a hearing by the Court of Appeals and twice they sought to stay the mandate. They have complained about the passage of time (Pb70), but this has been caused by their unwillingness to go to an evidentiary hearing and their numerous motions to avoid this in the lower courts. They call the procedure utilized against Helfant as normal and in accordance with "settled practice," yet cannot give, nor

5. *Cf.*, Pb46 to Pb21 and 28. Again, if the court was interested in protecting the New Jersey court system from ridicule why was it not interested in the merits as petitioners have stated (Pb16).

6. Helfant testified that it was the tone of the Chief Justice's last question that convinced him the court would take action against him if he again resorted to the Fifth Amendment (App. 87).

have even attempted to give, one example of a similar occurrence. In each and every disciplinary case that has appeared before the court, formal disciplinary proceedings were instituted prior to the contact of the New Jersey Supreme Court with the involved individual. *See, e.g., In re Abrams,* 65 N.J. 172 (1974); *In re Colsey,* 63 N.J. 210 (1973); and especially *In re Blasi,* 64 N.J. 71, 73 (1973) in which the court came in contact with the attorney after a presentment has been submitted by the county ethics committee after the conclusion of criminal charges against the attorney. *Cf., Yick Wo v. Hopkins,* 118 U.S. 356 (1886).

The petitioners claim that the *en banc* decision of the Court of Appeals "tears at the very roots of 'Our federation'" (Pb19). They claim that the decision is "officious and unjustified" (Pb26), has paralyzed the administration of a state judicial system and disrupted its criminal processes (Pb19). They further claim that the decision has seriously threatened the ability of the New Jersey Supreme Court to faithfully discharge its constitutional obligations (Pb26-27). These grandiose statements also cannot withstand close scrutiny. The criminal justice system has continued to function in New Jersey, unimpeded by the present case. The New Jersey Supreme Court has continued in its duties, part of which have been the discipline of attorneys. *See, In re Lanza,* 65 N.J. 347 (1974); *In re Abrams, supra; In re Colsey, supra; In re Blasi, supra.* No legitimate function has been paralyzed or seriously impaired.[7] What has been illuminated is perhaps the most extraordinary incident ever associated with the highest

7. Indeed, petitioners argue that three members of the court have since retired and thus Helfant need not face those same individuals whom he alleged were involved in the coercion; thus, they argue that his harm is not great and immediate. If that is so, and this is by no means conceded, then how can they argue that the administration of the "entire State judicial system (Pb26)" has been affected? How is the independence of the New Jersey Supreme Court threatened?

court of a state. It involves a gross abuse of power, a perversion of legitimate state functions. The record shows this and belies any contrary finding. It is a situation that cries out for immediate rectification by the federal courts, for the harm has been great and immediate and continues to the present day.[8]

With such basic and fundamental considerations at stake, we return to the basic thesis of this reply brief: the legitimacy of the appellate process. For, as the legitimacy of the state criminal processes has been called into question by the present case, the petitioners' structuring of their statement of facts has called into question the basis integrity of the appellate system.

As was said at the outset of this reply brief, the integrity of the entire appellate process depends upon a full and accurate record being placed before the appellate tribunal. It is counsel's responsibility to insure that this happens. An inaccurate or contrived factual statement simply cannot be the basis for an appellate decision, especially from the highest Court of our land. *Cf., Chessman v. Teets*, 350 U.S. 3 (1955). It is the duty of the prosecution in a criminal case to insure that only truthful evidence is brought before the trial court and this duty continues

8. Petitioners' reliance upon 28 U.S.C. §2254(d) (1970) is entirely misplaced (Pb71). As has been repeatedly stressed by respondent, the constitutional harm alleged is the inability *now* of the state courts to adequately protect his rights. There is no adequate state forum now. Federal habeas corpus in the future could not rectify what has happened to respondent's ability to adequately protect his interests presently.

Moreover, a strict prophylactic rule is necessary here. Federal habeas corpus, depending as it must on numerous state procedures, *Thomas v. Craven*, 473 F.2d 1235 (9th Cir. 1973); *United States ex rel. Thomas v. State of New Jersey*, 472 F.2d 735 (3rd Cir. 1973); *Leavitt v. Howard*, 462 F.2d 992 (1st Cir.), *cert. denied*, 409 U.S. 884 (1972), could not strike at this heinous conduct with the force and power of an injunction.

throughout the appellate process.[9] The prosecution's knowing use of false testimony is misconduct upon which a dismissal of the charges could lie. *United States v. Heath*, 260 F.2d 623 (9th Cir. 1958); *United States v. Banks*, 374 F. Supp. 321 (D. S.D. 1974). "[S]erious prosecutorial misconduct may so pollute a criminal prosecution as to require dismissal of the indictment or a new trial, without regard to prejudice to the accused." *United States v. McCord*, 43 U.S.L.W. 2257 (D.C. Cir., Dec. 12, 1974).

Legal niceties shall not serve to determine the present case.[10] They shall not serve to avoid the requirements of due process. Misstatements of fact shall not be allowed to disguise inconsistent arguments. Respondent's rights shall be vindicated when this Court grants him the relief requested.

9. The American Bar Association Standards on the Prosecution Function, section 5.6(b) is instructive:

> It is unprofessional conduct for a prosecutor knowingly to offer false evidence, whether by documents, tangible evidence or the testimony of witnesses.

The commentary to this section explains:

> It is so elementary that it hardly calls for comment that a prosecutor, in common with all other advocates, is barred from introducing evidence which he knows to be false. This obligation applies to evidence which bears on the credibility of a witness as well as to evidence on issues going directly to guilt. *Napue v. Illinois*, 360 U.S. 264 (1950). Even if false testimony is volunteered by the witness and takes the prosecutor by surprise rather than being solicited by him, if he knows it is false, his obligation is to see that it is corrected. *Ibid.; See, United States v. Poole*, 379 F.2d 645 (7th Cir. 1967).

10. *Cf.*, Pb43-72.

CONCLUSION

An examination of the actual facts of this case mandates the conclusion that respondent has suffered, and continues to suffer, great and immediate constitutional harm. Thus, this Court should permanently enjoin his state prosecution, or, in the alternative, remand this matter to the district court for further proceedings.

Respectfully submitted,

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